Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LANCE E. LINDBLOM,

Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Privacy Act, 5 U.S.C. § 552a, permits a government agency to permanently maintain a record describing a person's First Amendment activities even when the information is no longer pertinent to and within the scope of an authorized law enforcement activity.

RULE 14.1(b) LIST OF PARTIES TO PROCEEDING BELOW

Appellants: J. Roderick MacArthur Foundation
Lance E. Lindblom

Appellee: Federal Bureau of Investigation

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Intelligence Activities and the Rights of Americans, Final Report of the United States Senate Select Committee to Study Government Operations With Respect to Intelligence Activities, S. Rep. 94-755 (1976) 8

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Richard Ehlke, *The Privacy Act After a Decade*, 18 J. Marshall L. Rev. 829 (1985) 8

John F. Joyce, *The Privacy Act: A Sword and a Shield But Sometimes Neither,* 99 Mil. L. Rev. 113 (1983) 8

Neil A. Lewis, *Clinton Apologizes Over Use of FBI To Get GOP Files*, N.Y. Times, June 10, 1996, at A1 12

Neil A. Lewis, *White House Got More Files Than Disclosed*, N.Y. Times, June 26, 1996, at A1 12

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Federal Bureau of Investigation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Petitioner Lance E. Lindblom respectfully petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit affirming the district court's grant of summary judgment to the Federal Bureau of Investigation on Lindblom's Privacy Act claim.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia granting respondent's motion for summary judgment and dismissing the complaint with prejudice, *J. Roderick MacArthur Found. v. FBI*, No. 90-2906, slip op. (D.D.C. Sept. 6, 1995), is unreported and is enclosed in the appendix at page 20a (hereinafter "App. __"). The opinion of the United States Court of Appeals for the District of Columbia Circuit affirming the district court's judgment, review of which is sought by this Petition, is reported as *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600 (D.C. Cir. 1996), and is reprinted in the appendix, App. 1a. The orders of the Court of Appeals denying rehearing and rehearing *en banc* are unreported and enclosed in the appendix, App. 21a and 22a.

JURISDICTION

Original jurisdiction in the district court was based upon 28 U.S.C. §§ 1331 and 1361. Petitioners appealed this case to the Court of Appeals pursuant to 28 U.S.C. § 1291. On December 24, 1996, the Court of Appeals affirmed the district court's grant of summary judgment. On April 11, 1997, the Court of Appeals denied rehearing and rehearing *en banc*. This Court has jurisdiction over the instant Petition for a Writ of Certiorari pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS AT ISSUE

This case involves Sections (a)(3) and (e)(7) of the Privacy Act ("the Act"), 5 U.S.C. § 552a.

Section (a)(3) of the Act provides that:

> [T]he term "maintain" includes maintain, collect, use, or disseminate.

Section (e)(7) of the Act provides that:

> (e) Agency requirements.--Each agency that maintains a system of records shall--
>
> (7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.

STATEMENT OF THE CASE

A. The Nature of the Case

From 1984 to 1994, Lance E. Lindblom served as president of the J. Roderick MacArthur Foundation ("the Foundation"), a charitable organization that makes grants to other charitable organizations. The Foundation's mission is to further democracy, human rights, civil liberties, freedom of expression, and social justice both in the United States and internationally. [J.A. 208][1] As president of the Foundation, it was necessary for Lindblom to frequently meet with foreign nationals and members of foreign political organizations, both in this country and abroad. [J.A. 209] For example, in early 1985, Lindblom along with several prominent Americans (including two members of Congress) accompanied South Korean politician and dissident Kim Dae Jung on a well-publicized trip back to South Korea from the United States. Kim Dae Jung--who subsequently became a respected member of his country's parliament--was returning from exile and Lindblom accompanied him in order to help assure his safety. The group's concern was that Kim Dae Jung might suffer a fate like that of Filipino dissident Benigno Aquino who was killed leaving the airplane upon his return to

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[1] Throughout this Petition, "J.A." shall refer to the Joint Appendix originally filed with the Court of Appeals.

the Philippines from exile in the United States. [J.A. 209-10]

In 1989, the FBI responded to a request by Petitioner under the Privacy Act, revealing that it was keeping records describing the First Amendment activities of Lindblom, including Lindblom's association with Kim Dae Jung. [J.A. 200] In response to that disclosure, Lindblom sued the FBI, alleging, *inter alia*, that its retention of records concerning his First Amendment activities violates the Privacy Act. [J.A. 9] Lindblom alleged that the retention of these records was chilling his exercise of First Amendment freedoms and sought their expungement. [J.A. 7] The gravamen of Lindblom's Privacy Act claim is that the FBI must justify its maintenance (*i.e.*, keeping) of records containing information about First Amendment protected activities, even if the initial collection of the information was lawful.

B. The Decisions of the District Court

The FBI responded to Lindblom's Complaint by moving for dismissal or, in the alternative, for summary judgment. [J.A. 55] Lindblom then moved under Rule 56(f) to take necessary discovery regarding "the factual predicate for the FBI deciding . . . to set up permanent retrievable files on [Lindblom] . . . [and] to continue to maintain the files after the close of the investigation." [J.A. 212-13] In addition, Lindblom sought to discover whether the government had disseminated any of the information in the files to any other party. Plaintiffs' First Set of Interrogatories, ¶ 27. The district court granted the FBI's motion to bar all such discovery. [J.A. 214]

On September 6, 1995, the district court entered a one-page order granting the FBI's motion for summary judgment and dismissing the complaint with prejudice. [J.A. 248] The order recites that "the documents were compiled for legitimate law enforcement purposes." App. 20a. Presumably on the basis of the district court's *in camera* review of the file, the order further states that "the investigation(s) referred to therein were not *of* the plaintiffs, but of others with whom plaintiffs came into incidental (and, to appearances, innocent) contact." *Id.* (em-

phasis in original).[2] The court did not in any manner address whether the FBI's retention of the disputed records was pertinent to any ongoing law enforcement activity.

C. The Split Decisions of the Court of Appeals

On December 24, 1996, a divided panel of the District of Columbia Circuit affirmed the district court's grant of summary judgment in favor of the FBI. *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600 (D.C. Cir. 1996). The FBI had argued that once an agency demonstrates that a record was pertinent to an authorized law enforcement activity when it was collected, the Act's justification requirement for any future retention, use, or dissemination of the record is fully (and forever) satisfied. Brief for Appellee at 29-30. The majority agreed, holding that as long as information about an individual's First Amendment activities "was pertinent to an authorized law enforcement activity when the agency collected the information," the agency may retain the record containing the information indefinitely. App. 10a.

In assessing the burden on the FBI of Petitioner's construction of Section (e)(7), the majority reasoned that if the agency were required to justify the retention, as well as the collection of records, its "ability to accomplish its mission would inevitably suffer." *Id.* at 8a. This was, according to the majority, because intelligence gathering is like constructing a "mosaic" and consequently information that may appear "to be innocent when viewed in isolation may, when later viewed as part of a larger whole, acquire a more sinister air . . . . [I]nformation that was once collected as part of a now-closed investigation may yet play a role in a new or reopened investigation." *Id.* at 9a.

Judge Tatel dissented from this construction of Section (e)(7), finding it to be contrary to both the text and the important pur-

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[2] A declaration filed by the FBI stated that the investigation which produced documents about Lindblom "was conducted in accordance with the 'Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations.'" [J.A. 72-73]

poses of the Act. Noting that the Act "defines 'maintain' as including both 'maintain' and 'collect,'" Judge Tatel concluded that the text of Section (e)(7) requires that First Amendment-related files "be pertinent to 'an authorized law enforcement activity' . . . not only at the time of gathering, i.e., collecting, but also at the time of keeping, i.e., maintaining." *Id.* at 15a (Tatel, J., dissenting). Accordingly, Judge Tatel concluded that Section (e)(7) requires an independent justification for the retention of a name retrievable record: even if the information in the record was properly collected, an agency may retain it only if it demonstrates that the record is pertinent to a *current* authorized law enforcement activity. *Id.*

On April 11, 1997, the panel denied the Petition for Rehearing, though Judge Tatel would have granted the Petition with respect to the Privacy Act claim. App. 21a. On that same day, the Court of Appeals as a whole denied Petitioner's Suggestion for Rehearing *En Banc*, though Judges Wald and Tatel would have granted the Suggestion as to the Privacy Act claim. App. 22a.

REASONS FOR GRANTING THE WRIT

The Privacy Act of 1974 was landmark legislation made necessary by the disclosure of decades of government abuse in monitoring, and ultimately chilling, First Amendment rights of speech and association. The provision of the Act at issue in this case, Section (e)(7), prevents government in the absence of sufficient justification from collecting and retaining information about an individual's First Amendment activities. The appellate court's construction strips Section (e)(7) of much of this protection.

The Court of Appeals' decision allows federal agencies to keep files on the First Amendment activities of individuals indefinitely so long as the initial collection of the information was justified. Contrary to the plain meaning of Section (e)(7), as well as the structure and history of the Act, the decision eviscerates the statute's important requirement that the government

must have justification for each phase of the handling of such information--its collection, retention, use and dissemination.

For Petitioner, the decision means that the FBI may forever keep information on his protected political activities though the agency closed its file on him over a decade ago and despite the district court's finding that Lindblom was not the subject of the relevant foreign intelligence investigation but simply a person who had incidental and apparently innocent contact with its primary targets. But of course the impact of the Court of Appeals' decision will not be limited to Petitioner. Countless law-abiding people who also work in the international community and associate to advance a wide range of worthy causes will find themselves subject to the same system of record keeping and consequently, the same infringement of their basic freedoms. They, along with Petitioner, will suffer the deprivation of privacy and First Amendment rights inherent in government unjustifiably keeping information about their political and other associational activities. They, as well as Petitioner, will be subject to harm from the future dissemination of such information to other federal and state agencies and foreign governments. Finally, they, as Petitioner, also will rightfully fear the dissemination of information about their protected associations through unlawful means, as in the recent "Filegate" affair.

The Court of Appeals' construction is not just narrower than that required by a plain reading of the Act and the intent of Congress. It grants the FBI unwarranted discretion to build intelligence dossiers containing the constitutionally protected beliefs and associations of innocent individuals by effectively insulating the agency's record keeping from judicial review. Under the majority's decision there will be no redress for the indefinite retention and endless compilation of information describing individuals' First Amendment protected activities. The proper construction of the Act's restraint on the maintenance of First Amendment information is of profound national importance and deserving of the Court's review.

This case is deserving of review for another reason. The decision creates a conflict with the Court of Appeals for the Sev-

enth Circuit, which properly has interpreted the Act as requiring government to independently justify retaining lawfully collected information. This case will therefore provide this Court with an opportunity to provide necessary guidance to the Courts of Appeals on the important issue of the scope of the Act's protection of core First Amendment freedoms.

I. THE COURT OF APPEALS' DECISION STRIPS THE PRIVACY ACT OF THE PROTECTION IT AFFORDS CORE FIRST AMENDMENT RIGHTS

The Privacy Act of 1974 was adopted in the wake of Watergate and Congressional investigations into the discredited practice of government building databases describing the political activities of its critics and others suspected of having unorthodox political views. These practices were widespread within the FBI.[3] The Act was "designed to preclude the reoccurrence of [such] past governmental abuses." John F. Joyce, *The Privacy Act: A Sword and a Shield But Sometimes Neither*, 99 Mil. L. Rev. 113, 131 (1983). Although Section (e)(7) represents only one part of the comprehensive legislation designed to safeguard many aspects of citizen privacy, "[t]he Act's prohibition against agency maintenance of records relating to an individual's first amendment activities embodies one of the concepts that motivated enactment of privacy legislation in the first place." Richard Ehlke, *The Privacy Act After a Decade*, 18 J. Marshall L. Rev. 829, 844 (1985).

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[3] The problem is voluminously described in the 1971 hearings of the Ervin Committee, *Federal Data Banks, Computers and the Bill of Rights: Hearings Before the Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong. (1971); and the 1976 report of the Church Committee, *Intelligence Activities and the Rights of Americans*, Book 2 of the *Final Report of the United States Senate Select Committee to Study Government Operations With Respect to Intelligence Activities*, S. Rep. 94-755 (1976).

A. The Court of Appeals' Decision Approves Keeping Information About the Associational Activities of Countless Innocent Individuals

Notwithstanding Congress' express intent to safeguard the First Amendment and privacy interests of individuals, the Court of Appeals' construction of the Act approves the keeping of files on the First Amendment activities of law-abiding persons simply because they live and work in today's global community. Lindblom is representative of many individuals who, as part of their personal and professional lives, have associational relationships with persons from foreign nations "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). As president of the J. Roderick MacArthur Foundation, Mr. Lindblom met with foreign nationals to advance the causes of human rights and civil rights in other countries. Such contacts between staff of philanthropic organizations in the United States and people from other countries have become quite common. [Amicus Brief of Council on Foundations, Inc. at 1-12; Declaration of Valerie S. Lies, President of Donors Forum of Chicago [J.A. 227-28]] This is particularly true since the break up of the Soviet Union and the concerted effort by foundations in the United States to instill the tenets of democracy in the newly independent countries. [Amicus Brief of Council on Foundations at 3, 4, 6, 9]

The FBI has stated that the investigation that resulted in records describing Petitioner's First Amendment activities involved foreign intelligence gathering. [J.A. 72-73][4] These types of investigations are likely to involve persons from foreign countries. They are not predicated on the consent of the subject as in background investigations, or on suspicion of criminal activity as in criminal investigations. *See, e.g.*, Attorney General Guidelines for FBI Foreign Intelligence Collection and

[4] A review of the file by the FBI following the decision in the appeals court resulted in the release to Petitioner of more specific information: his file bears the identification "199.C," which indicates a foreign counterintelligence file. *See* 44 Fed. Reg. 58,980, 58,986 (1979).

Foreign Counterintelligence Investigations at 5 (1983, amended 1987, 1989). The scope of foreign intelligence investigations is much broader and the basis for initiation more loosely defined. For example, the FBI admits that information collected pursuant to its counterintelligence authority may not relate to the suspected commission of any past or future crimes [J.A. 69-71] and that it may develop an investigative interest in individuals even if they have "no unlawful or hostile intent." [J.A. 71][5]

Because of their breadth and the lack of a firm predicate for these investigations, the probability that information about the First Amendment activities of innocent individuals will be collected and maintained pursuant to such investigations is high. Indeed, Lindblom's case illustrates this point quite plainly.

Moreover, the majority's endorsement of a "mosaic" theory to justify retention of apparently innocent information will actually result in *encouraging* agency staff to retain information describing individual's protected activities that even they believe are in all likelihood innocent. According to this theory, as defined by the majority, in intelligence gathering even if information appears to be innocent, it should not be purged because it could yet later "play a role in a new or reopened

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[5] In the trial court Lindblom submitted the declaration of retired FBI agent, Hugo Rodriguez, describing the practices of the FBI relating to foreign counterintelligence ("FCI") investigations. [J.A. 215-21] Mr. Rodriguez confirmed that when an American citizen had contact with a person of FCI interest, it was standard FBI practice to create a retrievable record recording that contact under the name of the American. This happened even when there was no reason to suspect that the American was engaged in any kind of criminal or foreign intelligence-related activity, and even when the target of the investigation with whom the American had contact was not being investigated for criminal or unlawful activity. [J.A. 220] Mr. Rodriguez also confirmed that the FBI had no protections in place against the accumulation of unnecessary or irrelevant information concerning Americans' First Amendment activities, but to the contrary, incentives existed to accumulate as much information as possible. [J.A. 219-20] He stated that "the basic mind-set of agents operating in the FCI field was to amass as much information as possible on the theory that it might turn out to be useful some day." [J.A. 220]

investigation." App. 9a.

And so, this justification for keeping records leads inexorably to the government's unending storage of information about the First Amendment activities of countless people, by actually exerting pressure on agencies like the FBI to retain files on virtually every person on whom they have collected information in an intelligence investigation. After all, the mosaic theory will paint a field agent as irresponsible for not retaining information about all encounters between Americans and foreign nationals of interest to the FBI. There is always a chance that later events would fit the meeting into a suspicious pattern.

As Petitioner's case proves, no matter how peripheral the person is to the target of an intelligence investigation, or how remote the threat to national security, or how absolutely innocent of any wrongdoing, the Court of Appeals' decision authorizes, and actually encourages, the indefinite retention of information about a person's associational conduct and beliefs.

B. The Wholesale Retention of Records Describing the First Amendment Activities of Individuals Imposes Considerable Harm

Congress clearly has recognized the harms that occur when federal agencies maintain files describing individuals' First Amendment activities. First, the preamble to the Act recognizes that the mere retention of files on these citizens is itself an invasion of their privacy: "the privacy of an individual is directly affected by the collection, *maintenance*, use, *and* dissemination of personal information by Federal agencies." Privacy Act of 1974, Pub. L. 93-579, § 2(a)(1), 88 Stat. 1896, 1897 (emphasis added). But Congress reflected even more ominously in the preamble its awareness that the retention of such files inevitably increases the risk that information will be disseminated and used by third parties. This threatens not only further invasions of privacy, but also endangers "the opportunities for an individual to secure employment, insurance, and credit, and his right to due process and other legal protections." *Id.* at (a)(2).

The danger that such files will be used and disseminated is very real. FBI regulations authorize disclosure of information in name retrievable files, such as those on Lindblom, to any federal agency in connection with an application for employment or a security clearance. They also authorize disclosure to foreign government agencies. *See* 58 Fed. Reg. 51,846 (1993).

In addition, the retention of these files increases the risk that the retained information will be *illegally* used and disseminated. The recent "Filegate" controversy illustrates this problem perfectly. The public learned in June 1996 that members of the Clinton Administration illegally obtained from the FBI the confidential files of nearly 1,000 people, including such prominent Republicans as former Secretary of State James Baker. *See, e.g.*, Neil A. Lewis, *Clinton Apologizes Over Use of FBI To Get GOP Files*, N.Y. Times, June 10, 1996, at A1; Neil A. Lewis, *White House Got More Files Than Disclosed*, N.Y. Times, June 26, 1996, at A1. In refusing to dismiss an action against the Clinton Administration brought by employees of the Bush and Reagan Administrations whose FBI files had been illegally disseminated, the District Court for the District of Columbia observed:

> FBI Director Louis J. Freeh has himself described what occurred in this case as 'egregious violations of privacy' . . . He describes the system as having failed, and concedes that this failure 'affected the privacy rights of many persons.'

Alexander v. FBI, No. 96-2123, slip op. at 8 (D.D.C. June 12, 1997).

Thus, the longer that agencies retain records on the First Amendment-related activities of innocent individuals even though not pertinent to any current law enforcement activity, the more likely that such information will be subject to widespread use and dissemination. And the more likely, therefore, that innocent people will suffer the very injuries that Congress sought to eradicate in promulgating the Privacy Act. Judge Tatel correctly observed, "The fewer unnecessary files describ-

ing First Amendment activities the government keeps on law-abiding citizens, the lesser the chance of any future abuse of those files." App. 17a (Tatel, J., dissenting).

II. THE PRIVACY ACT REQUIRES THE GOVERNMENT TO PROVIDE JUSTIFICATION FOR THE RETENTION AS WELL AS THE INITIAL COLLECTION OF INFORMATION DESCRIBING FIRST AMENDMENT ACTIVITIES

The Court of Appeals' construction of Section (e)(7) fails to conform to the plain meaning of the statute, and undermines Congress' intent in seeking to protect First Amendment freedoms. As Judge Tatel concluded, the majority's interpretation is contrary to the text, structure, history and purpose of the Act.

1. By its plain terms, Section (e)(7) requires agencies to justify their retention of records. "In deciding a question of statutory construction, we begin of course with the language of the statute." *Demarest v. Manspeaker*, 498 U.S. 184, 187 (1991). A plain reading of the text of Section (e)(7) makes it clear that there must be an independent justification for the *retention* of records, separate and apart from the justification for the prior *collection* of records.

Judge Tatel properly recognized that the majority "effectively read[] the word 'maintain' out of that term's statutory definition . . . ." App. 15a (Tatel, J., dissenting). The Privacy Act defines "maintain" to include both "maintain" and "collect." 5 U.S.C. § 552a(a)(3). "Collect" and "maintain" have different ordinary meanings: while "collect means "to gather together," *Random House Dictionary of the English Language* 289 (1971), "maintain" means "to keep in existence or continuance" and to "preserve." *id.* at 865. "In order to give each of these verbs its meaning, I would interpret § (e)(7), as a whole, to require that records be pertinent to 'an authorized law enforcement activity' . . . not only at the time of gathering, i.e., collecting, but

also at the time of keeping, i.e., maintaining." App. 15a (Tatel, J., dissenting). Fundamental principles of statutory interpretation compel Judge Tatel's conclusion. *See Bailey v. United States*, ___ U.S. ___, ___, 116 S. Ct. 501, 507 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").[6]

Judge Tatel next noted that "Congress could have written § (e)(7) in either of two ways that would clearly give it the meaning" that the *MacArthur* majority ascribed to it, but Congress in fact did not do so. App. 15a (Tatel, J., dissenting). If Congress had meant to limit only the collection of information, and not also the retention of information, the Act would simply provide: an agency may not *collect* any record describing how any individual exercises rights guaranteed by the First Amendment unless pertinent to and within the scope of an authorized law enforcement activity. Alternatively, if Congress had meant that any properly collected document may be retained indefinitely, the Act would simply provide: an agency may not *retain* any record describing how any individual exercises rights guaranteed by the First Amendment unless *collected for* and within the scope of an authorized law enforcement activity. *Id.* at 15a-16a.

By insisting that Section (e)(7) require with even greater clarity an independent justification for the retention of records, it is the majority that ends up with a construction that is disconnected from the statutory text. The majority insists that had Congress intended that the *retention* of a record be independently justified, the statute would have used the exact words "an agency 'shall maintain no record relating to first amendment activities unless *doing so would be* pertinent to and within

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[6] Judge Tatel's conclusion is further buttressed by the use in Section (a)(3) of the disjunctive connector "or" between the verbs "collect" and "maintain." *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings . . . .").

the scope of an authorized law enforcement activity.'" App. 6a (emphasis in original).[7] Since this is not what the statute says, the majority satisfied itself that only the collection of a record requires justification.

But in holding that Section (e)(7) does not prohibit the retention of a record as long as the information in the record "was pertinent to an authorized law enforcement activity when the agency collected the information," *id.* at 10a, the majority necessarily (and without any basis) confines that restriction to the time period when the collection occurred: it says that, as long as the information was pertinent to an authorized law enforcement activity *then*, it may not only be collected, but indefinitely retained as well. In other words, the majority reads Section (e)(7) as though it said that an agency "shall . . . collect, [retain,] use, or disseminate no record relating to First Amendment activities unless pertinent to and within the scope of an authorized law enforcement activity *at the time of collection*."

But this is simply not what Section (e)(7) says. Since the section refers to four different actions that can be taken with respect to a record--collecting it, retaining it, using it, and disseminating it--and since these actions can obviously take place at different times, a natural reading would require that *the pertinence of the record be assessed at the time of the proposed action*. Thus, under Section (e)(7) an agency is not prohibited from collecting a record as long as the record is pertinent to an authorized law enforcement activity when collected. Similarly, the retention of a record is not prohibited by Section (e)(7) if the record is pertinent to an authorized law enforcement activity when retained.

2. An analysis of the structure of the Act as a whole provides further support that Section (e)(7) limits the government's storage and retention of information, separate and apart from limiting the government's collection or compilation of information. *See Robinson v. Shell Oil Co.*, ___ U.S. ___, 117 S.Ct.

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[7] In fact, this is effectively what the preamble to the Act states. *See infra* at 16-17.

843, 846 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment) ("The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is (1) most in accord with context and ordinary usage . . . and (2) most compatible with *the surrounding body of law* into which the provision must be integrated . . . .") (emphasis added).

Repeatedly, other portions of the Act solely address the government's collection or compilation of information. *See, e.g.*, 5 U.S.C. § 552a(e)(2) (concerning "collect[ion] of information"); § 552a(j)(2)(A) ("information compiled for the purpose of identifying individual criminal offenders"); § 552a(k)(2) ("investigatory material compiled for law enforcement purposes"); § 552a(k)(5) ("investigatory material compiled solely for the purpose of" eligibility for certain jobs, contracts, and information). As Judge Tatel reasoned in *MacArthur*, "Congress knows how to use the words 'collect' and 'compiled for' without also meaning 'maintain.'" App. 16a (Tatel, J., dissenting). If Congress had meant to restrict the government's collection and compilation of information without separately restricting the government's storage and retention of information, it simply would have done so.

3. The legislative record also shows that Congress intended for the retention of records to be given independent justification. Judge Tatel explained, "the legislative history of the Privacy Act reveals congressional concern with *both* collection and retention of materials." *Id.* (emphasis in original).

In the Act's preamble--a statement of findings and purposes specifically enacted into law by Congress, *see Green*, 490 U.S. at 528 (Scalia, J., concurring in the judgment) ("The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is . . . most likely to have been understood by the *whole* Congress which voted on the words of the statute . . . .") (emphasis in original)--Congress made clear that,

contrary to the majority's view, the phrase "pertinent to and within the scope of an authorized law enforcement activity" modifies not only the word "record," but the entire phrase "maintenance of a record." *See* App. 6a. . The preamble requires federal agencies to

> collect, maintain, use, or disseminate any record of identifiable personal information *in a manner* that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information.

Privacy Act of 1974, Pub. L. 93-579, § 2(b)(4), 88 Stat. 1896, 1897 (emphasis added). The adverbial phrase "in a manner" can modify only the verbs "collect, maintain, use, or disseminate," and cannot modify the noun "record." In other words, the government may only "maintain" records (or, for that matter, collect them, use them, or disseminate them) if it does so-- *i.e.*, *maintains* them-- "in a manner" consistent with various limits and safeguards. Thus, the Act's preamble demonstrates a clear congressional intent to restrict the government's storage and retention of records, separate and apart from its collection of records.

Moreover, on five separate occasions in the preamble, Congress specifically states that the Act addresses the government's "collection, *maintenance*, use, *or* dissemination" of records. *Id.* at (a)(1), (a)(2), (a)(5), (b)(1), (b)(4) (emphasis added). Such repetition of this key phrase makes abundantly clear Congress' concern to restrict by means of the Act all the activities comprised in the Act's definition of "maintain"--including the retention of records.

The Senate Report evidences the same concern. Judge Tatel wrote,

> the Senate Report recognizes collecting and maintaining files as separate activities, both deserving of careful scrutiny: '[The Act] is designed . . . for long-overdue evaluation of the needs of the Federal Government to acquire and

> retain personal information on Americans, by requiring stricter review within agencies of criteria for collection and retention.'

App. 16a (Tatel, J., dissenting) (*quoting* S. Rep. No. 93-1183, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6917).

4. The Court of Appeals majority essentially ignores each of these sources for construing Section (e)(7). In the place of recognized principles of statutory construction, the majority conducted a "cost-benefit" analysis of implementing Section (e)(7) as construed by Petitioner and concluded that burdens on the FBI would be too great. App. 8a. The primary burden was identified as having to abandon a mosaic theory of intelligence collection where even apparently innocent information is retained on the chance that it may later prove to be of value. As demonstrated above, this theory leads to pernicious consequences for First Amendment rights. However, the point we make here is that such analysis simply has no place when the task at hand is construing a statute. In any event, in crafting Section (e)(7), Congress already exercised its judgment in balancing the legitimate interests of government and individual freedoms; it was not within the province of the Court of Appeals to substitute its own.[8]

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[8] The majority also argues that Petitioner's interpretation imposes too great an "administrative burden" on the FBI. *Id.* But a review of whether a retained record is pertinent to a current law enforcement activity is not more burdensome than what the FBI does in response to every request for release of documents it receives under the Privacy Act. In this case, government submissions to the district court show that at least two agents reviewed Lindblom's files. [J.A. 59 and 96]

III. THE DECISION BELOW CONFLICTS WITH THE SEVENTH CIRCUIT'S INTERPRETATION OF SECTION (e)(7)

The *MacArthur* majority's decision conflicts with *Becker v. IRS*, which holds that the Privacy Act requires an agency to expunge records if the agency cannot demonstrate "a legitimate justification for maintaining the documents in a file for an extended period of time." 34 F.3d 398, 409 (7th Cir. 1994). Appellants in *Becker* sought expungement of records collected and retained by the IRS, containing newspaper articles about tax protesters that did not mention them and that were not about them. They apparently did not challenge the initial collection of the information in the records. What they sought was to prevent the IRS from retaining the records. In this respect, of course, these facts are on all fours with the present facts. Lindblom does not challenge the FBI's initial collection of the information, challenging only its ongoing retention of the record.

It is clear that, for the *Becker* court, Section (e)(7) requires a separate justification for record retention. The court accepted the district court's finding that the information in the records was "pertinent to and within the scope of an authorized law enforcement activity." Under the D.C. Circuit's construction, this finding would end the inquiry: proper collection guarantees proper retention. Not so with the *Becker* court, however. Rather, and notwithstanding the justification of the collection, the panel in *Becker* unanimously held that "the IRS has not sufficiently *justified* the maintenance of the documents in the Beckers' files." *Id.* at 409 (emphasis supplied). Obviously, the reference to "maintenance" here cannot be understood to refer to the initial collection, for, again, the collection was proper and hence justifiable. "Maintenance" refers to the *retention* of the records, and the court held that the IRS had not sufficiently justified that retention. It follows, of course, that the *Becker*

court presupposed that the retention of records must be independently justified.[9]

The majority mischaracterized *Becker*, describing the result reached by the Seventh Circuit as if it depended on the fact that the newspaper articles did not mention appellants by name. App. 5a. But that is simply not the basis of *Becker*'s reasoning; indeed, the Seventh Circuit expressly relied on the district court's finding that the maintenance of those articles in the appellants' files "'unquestionably implies that they are associated with the tax protesters and cheats described in the newspaper articles,' and therefore describes 'how the plaintiffs exercise their First Amendment rights of speech and association.'" *Id.* at 409 (quoting the district court). Thus, the *Becker* court recognized that, in the context of the articles' actually being in the appellants' files, they certainly did "relate to" the appellants, and in particular to their First Amendment activities.

The majority also attempted to undermine the *Becker* opinion by asserting that the Seventh Circuit confused Section 552a(e)(7) with Section 552a(k)(2), noting that at one point the Seventh Circuit cites a case concerned with the latter provision. *See* App. 6a. This contention is meritless: although the *Becker* court does refer to "law enforcement purposes" once rather than "law enforcement activity" (the language of Section (e)(7)), *see* 34 F.3d at 408, the cases the Seventh Circuit proceeded to cite and discuss are all Section (e)(7) cases.

The conflict between *Becker* and the Court of Appeals' decision in this case is clear. In *Becker*, the Seventh Circuit ordered expungement of lawfully collected files because the

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[9] Again, the court wrote that "the IRS has not *carried its burden* in establishing that the materials are exempt from Privacy Act requirements . . ." *Id.* at 409 (emphasis supplied). But the IRS *had* carried its burden with respect to collection; it again follows that, for the *Becker* court, Section (e)(7) imposes burdens on justifying not only the collection of records, but the retention of records as well.

agency could not demonstrate a legitimate justification for retaining those files. In this case, the District of Columbia Circuit refused to order expungement in a legally identical situation.

CONCLUSION

For all of these reasons, Petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 9, 1996 Decided December 24, 1996

No. 95-5386

J. RODERICK MACARTHUR FOUNDATION AND
LANCE E. LINDBLOM,
APPELLANTS

v.

FEDERAL BUREAU OF INVESTIGATION,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 90cv02906)

Kate A. Martin argued the cause for appellants, with whom *Harvey M. Grossman* was on the briefs.

Freddi Lipstein, Senior Counsel, U.S. Department of Justice, argued the cause for appellee, with whom *Frank W. Hunger*, Assistant Attorney General, *Eric H. Holder, Jr.*, U.S. Attorney, and *Leonard Schaitman*, Attorney, U.S. Department of Justice, were on the brief.

Before: GINSBURG, RANDOLPH, and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

Opinion concurring in part and dissenting in part by *Circuit Judge* TATEL.

GINSBURG, *Circuit Judge*: The J. Roderick MacAruthur Foundation and its former president Lance E. Lindblom seek to compel the Federal Bureau of Investigation to expunge its records relating to their associational activities and to refrain from maintaining such records in the future. Lindblom invokes both the Privacy Act, 5 U.S.C. § 552a, and the First Amendment to the Constitution of the United States; the Foundation relies solely upon the first amendment.

Lindblom challenges only the FBI's retention of information about him, not its initial collection of that information. We hold that the Act does not forbid the Government from keeping information that it has lawfully collected and therefore we reject Lindblom's statutory claim. We decline to reach the appellants' first amendment claims because neither Lindblom nor the Foundation has standing to raise them. Accordingly, we affirm the order of the district court.

I. Background

As president of the Foundation, which provides grants to organizations involved with various political, social, and economic issues, Lindblom occasionally met with foreign leaders and political dissidents. At some point Lindblom's associations caught the attention of the FBI. When Lindblom and the Foundation later got wind of the FBI's interest they asked the Bureau, pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a), for copies of all documents it had relating to them. The FBI informed them that it had a file on Lindblom consisting of 23 pages of materials and that, although the FBI

did not have a file on the Foundation, it had located in their files five pages on which the Foundation's name appears. (For the purposes of this case, the distinction between a "file" and the statutory term "record" is immaterial and we use the terms interchangeably.) The FBI released redacted copies of several of the documents relating to Lindblom and the Foundation but refused to release others, invoking exemptions 1, 2, 7(C), and 7(D) to the FOIA. At least some of the documents that the FBI released from the Lindblom file refer to Lindblom's associational activities.

Displeased by the nature of the material released and dissatisfied because other material was withheld, Lindblom and the Foundation sued the FBI in District Court claiming that the Bureau's conduct violates their rights under the FOIA and the First, Fifth, and Ninth Amendments to the Constitution of the United States. Lindblom also claimed that the FBI violated § (e)(7) of the Privacy Act, which forbids a government agency from maintaining records on an individual's first amendment activities unless the records are pertinent to and within the scope of an authorized law enforcement activity. In addition to monetary damages and an injunction, the parties asked the court to order the FBI to expunge its records concerning them and to refrain from maintaining any such records in the future.

After reviewing the documents *in camera*, the district court granted the FBI's motion for summary judgment. The court held that the documents were exempt from release under the FOIA and that the court's review of the documents had shown "that the investigation(s) referred to therein were not *of* the plaintiffs, but of others with whom the plaintiffs come into incidental (and, to appearances, innocent) contact." (Emphasis in original.)

II. Analysis

On appeal, Lindblom and the Foundation have abandoned their claims under the FOIA and under the fifth and ninth amendments in favor of pursuing only their Privacy Act and first amendment claims. We begin by analyzing Lindblom's

claim under the Privacy Act. We then turn to the appellants' separate efforts to demonstrate their standing to raise a first amendment claim.

A. *The Privacy Act Claim*

Section (e)(7) of the Act provides in relevant part that a government agency "shall ... maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless ... pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7). Section (a)(3) of the Act defines to "maintain" as to "collect, maintain, use [or] disseminate."

Lindblom does not challenge the FBI's having collected information about him, and we assume that the information was pertinent to an authorized law enforcement activity when it was collected. Lindblom's claim is that an agency may not maintain (that is, retain) such lawfully collected information unless there is a current law enforcement necessity to do so. More specifically, he claims that "information which may have been properly collected as part of a legitimate law enforcement investigation may not be permanently kept under the name of the individual, especially when that individual is not the target of the investigation."

First, we note that the Act does not distinguish between the "target" of an investigation and any other subject (such as a crime victim) mentioned in the course thereof. Second, contrary to Lindblom's argument, the Act refers not to a "law enforcement investigation" but to an "authorized law enforcement activity." Materials may continue to be relevant to a law enforcement activity long after a particular investigation undertaken pursuant to that activity has been closed—of which more later. These points aside, Lindblom's primary assertion, that the Act forbids maintenance of information about first amendment activities unless that information serves a "current law enforcement necessity," requires more extended analysis.

Lindblom cites no authority for this proposition. We

have not had occasion to consider it before, even in cases in which it seems obvious that the authorized law enforcement activity pursuant to which records were collected was of no current law enforcement interest, much less "necessity." *See Doe v. FBI*, 936 F.2d 1346, 1348, 1360-61 (D.C. Cir. 1991) (§(e)(7) "permits an agency to maintain records describing" plaintiff's "political activities during the late 1960s and early 1970s"); *Nagel v. U.S. Dept. of Health, Educ. and Welfare*, 725 F.2d 1438, 1441-42 (D.C. Cir. 1984) (maintenance of records describing exercise of first amendment rights by long-since fired employee does not violate § (e)(7) because records were compiled as part of effort to determine whether employee was adequately doing his job). Nor does a recent Seventh Circuit case upon which Lindblom lays great stress quite reach the issue before us: In *Becker v. IRS*, 34 F.3d 398, 408-09 (1995), the court held that the Privacy Act requires the IRS to remove from the appellants' files newspaper articles about tax protesters that neither named nor referred to the appellants. The court seemed to think that the lack of connection between the newspaper articles and the appellants was a reason for ordering the documents excised. 34 F.3d at 409. Yet if the articles did not relate to the appellants, we do not understand how the articles could qualify for expungement under § (e)(7) as records "describing how [the appellants] exercise[ ] rights guaranteed by the First Amendment." 5 U.S.C. § 552a(e)(7). At any rate, the court's analysis of § (e)(7) in *Becker* is neither clear nor compelling. The court set out to determine the meaning "of the 'law enforcement purposes' phrase of § 552a(e)(7)" not realizing that the phrase used in the Privacy Act is "authorized law enforcement activity." The court appears to have confused § 552a(e)(7) with § 552a(k)(2), which exempts from the requirements of the Act a system of records containing "investigatory material compiled for law enforcement purposes." The latter section, however, relates to the disclosure of material in an agency's files. It is not surprising that an agency must shoulder a greater burden in order to avoid merely disclosing law

enforcement material than it must in order to avoid expunging such material. A record disclosed pursuant to the Privacy Act or the FOIA is not thereby made unavailable for use in future law enforcement activities. A record expunged pursuant to the Privacy Act, on the other hand, is a record gone forever. That the court in *Becker* confused the statutory standard is suggested also by its reliance upon *Voelker v. IRS*, 646 F.2d 332, 335 (8th Cir. 1981), a case involving only the disclosure, not the expungement, of records under the Privacy Act.

Looking at the terms of § (e)(7), we find no support for Lindblom's argument that the Act authorizes an agency to maintain a record describing first amendment activities only if and so long as there is a "current law enforcement necessity" to do so. [Reply Br. 4]. The noun "record" in § (e)(7) is modified in only two ways: the record must be "[1] pertinent to and [2] within the scope of an authorized law enforcement activity." We do not understand this to mean, as Lindblom would in essence require, that the record must be pertinent to an active investigation; "an authorized law enforcement activity" such as foreign counter-intelligence, is a concept far broader than either an active investigation or a "current law enforcement necessity." Nor do we think that the provision, as written, can be read to require that the maintenance of a record, as opposed to the record itself, must be pertinent to an authorized law enforcement activity. One might argue that the Congress meant to say that an agency may "maintain no record relating to first amendment activities unless *doing so would be* pertinent to and within the scope of an authorized law enforcement activity." But the Congress did not say that, we are aware of no reason to think it meant to say that, and Lindblom does not so argue.

Lindblom tries to bolster his narrow interpretation of § (e)(7) by noting that the Act defines "maintain" to include "collect, maintain, use [and] disseminate," but substituting any or all of those verbs in § (e)(7) does nothing to change what the adjective "pertinent" modifies. Insofar as Lindblom suggests that information must be pertinent to a law enforcement activ-

ity not only when the agency collects the material but for as long as the agency maintains, and whenever it uses or disseminates, the information, the point is trivial. Information that was pertinent to an authorized law enforcement activity when collected does not later lose its pertinence to that activity simply because the information is not of current interest (let alone "necessity") to the agency—a point seemingly lost upon our dissenting colleague.

Finding little support in the text of § (e)(7), Lindblom resorts to legislative history for the argument that the purpose of that section is to prevent the harm that arises from the Government's continuing retention of records regarding an individual's first amendment activities. Lindblom relies upon the statement in Senate Report No. 1183, 93d Cong., 2d Sess. 57 (Sept. 26, 1974), that the Privacy Act is aimed at "preventing collection of protected information not immediately needed, about law-abiding Americans, on the off-chance that Government or the particular agency might possibly have to deal with them in the future." Even if the focus upon "collection" here did not tend to undermine rather than to support Lindblom's argument, this particular Senate Report would be of little value to an understanding of § (e)(7): The report accompanied a preliminary Senate bill that did not contain the provision before us. As the previous page in the Senate Report makes clear, the quoted statement pertains to § 201(7) of the Senate bill, which provides that "Each federal agency shall ... maintain no program for the purpose of collecting or maintaining information describing how individuals exercise rights guaranteed by the first amendment unless the head of the agency specifically determines that such program is required for the administration of a statute which the agency is charged with administering or implementing." S. 3418, 93d Cong. § 201(7)(1974).

Section (e)(7) in its present form was added as part of a compromise between inconsistent House and Senate bills, as explained in the "Analysis of House and Senate Compromise Amendments to the Federal Privacy Act":

> The Compromise broadens the House provisions application to all First Amendment rights and directs the prohibition against the maintenance of records. However, as in the House bill, it does permit the maintenance, use, collection or dissemination of these records which are expressly authorized by statute or the individual subject or are pertinent to a duly authorized law enforcement activity.

Cong. Rec., Dec. 17, 1974 (reprinted in *Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579): Source Book on Privacy*, 94th Cong., 2d Sess. 860).

One may draw two conclusions from this bit of history. First, Senate Report 93-1183, which was written some months before the Senate accepted the provision before us, does not reflect the intent of the Congress when it enacted § (e)(7). Second, such legislative history as does relate specifically to the provision before us does not support Lindblom's reading of the provision; indeed it tends to undermine his interpretation.

Besides lacking support in both the statutory text and the legislative history of § (e)(7), Lindblom's interpretation of the Act would place new and daunting burdens, both substantive and administrative, upon the FBI and other government agencies, with little or no gain to individual privacy. If a law enforcement agency were required to purge its files of information regarding an individual so requesting whenever it had closed a particular investigation, then its ability to accomplish its mission would inevitably suffer. As we have said before, intelligence gathering is "akin to the construction of a mosaic," *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989); to appreciate the full import of a single piece may require the agency to take a broad view of the whole work. Suppose, for example, that a citizen is contacted by a foreign agent but the FBI, after investigation, determines that the contact is inno-

cent. If the same individual is later contacted by another foreign agent and perhaps thereafter by a third, then what had earlier appeared to be innocent when viewed in isolation may, when later viewed as part of a larger whole, acquire a more sinister air. Simply put, information that was once collected as part of a now-closed investigation may yet play a role in a new or reopened investigation. If the earlier record had been purged, however, then the agency's later investigation could not be informed by the earlier event(s).

Furthermore, if federal law enforcement agencies were required upon request to purge all such records, then they would surely be inundated with requests to do so. Responding to each such request could be difficult and time-consuming. To determine whether information is pertinent to an authorized law enforcement activity as it is being collected is relatively easy; to determine whether there exists a "current law enforcement necessity" to retain the information may be far more difficult. The agency would have to inquire of all its local offices and the offices of all other investigatory agencies whether there is a current law enforcement necessity for a particular record. That would not be an impossible task, of course, but it would be a major one; we are reluctant to think that the Congress required so formidable an undertaking, with so little potential benefit, absent a clear statement to that effect.

Nor would reading § (e)(7) to forbid an agency from maintaining information properly collected in the course of a now-dormant investigation contribute appreciably to individual privacy. Section (b) of the Act, 5 U.S.C. § 552a(b), prevents an agency from disclosing information in its files to the public. *See Department of Defense v. FLRA*, 510 U.S. 487, 494 (1994) (Privacy Act prohibits agency from disclosing employee addresses to collective-bargaining representatives). Indeed, a federal law enforcement agency (such as the FBI) may disclose information to another law enforcement agency (such as a local police department) only if the head of the latter agency has made a written request to the federal agency that maintains the

record specifying the "particular portion" wanted and the authorized law enforcement activity for which it is wanted. § (b)(7). *See Doe v. DiGenova*, 779 F.2d 74, 92 (noting "rigorous requirements that Congress chose to impose on the disclosure process by means of the Privacy Act") (Starr, J., concurring in the judgment). To say that an agency may maintain such information, therefore, is not to say that it may disseminate it.

In this case, Lindblom particularly objects to the FBI's maintenance of the relevant records in a file retrievable by his name. Lindblom points to dicta in two cases suggesting that whether information is kept in an individual's file or in a general subject file may be a factor to consider in determining whether the agency must expunge a record. *Becker*, 34 F.3d at 398; *MacPherson v. IRS*, 803 F.2d 479, 485 n.9 (9th Cir. 1986). Neither case is apposite, however. *Becker*, as we have seen, involves material unrelated to the individuals in whose files it was being kept. *MacPherson* involves material on a particular individual being kept in a general "tax protestor" file. Neither case indicates that an agency may not maintain records relating to an individual under that individual's name.

Accordingly, we hold that the Privacy Act does not prohibit an agency from maintaining records about an individual's first amendment activities if the information was pertinent to an authorized law enforcement activity when the agency collected the information. The Act does not require an agency to expunge records when they are no longer pertinent to a current law enforcement activity.

Lindblom also argues that the district court erred in denying his request for discovery. The district court has broad discretion to grant or deny a discovery request, and we will reverse such a decision only in unusual circumstances, *see Safecard Services v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), of which Lindblom points to none. The documents Lindblom sought in discovery were largely classified, and the district court's *in camera* review of those documents informed

its decision that discovery was not necessary in order for the court to rule upon the Government's motion for summary judgment. In this, the district court did not abuse its discretion.

B. *The First Amendment Claims*

The Foundation and Lindblom both claim that the FBI violated the first amendment by creating files on them based upon their associational activity. The FBI responds that it has no file on the Foundation and that its maintenance of lawfully gathered information about Lindblom does not violate his rights under the first amendment. We need not, however, decide whether the FBI violated the Constitution because the appellants lack standing so to claim.

"In order to establish standing under Article III, a complainant must allege (1) a personal injury-in-fact that is (2) "fairly traceable' to the defendant's conduct and (3) redressable by the relief requested." *Branton v. FCC*, 993 F.2d 906, 908 (D.C. Cir. 1992) (quoting *Allen v. Wright*, 486 U.S. 737, 751 (1984)). The injury-in-fact requirement has two elements: The plaintiff must show that it has suffered "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

1. *The Foundation's Standing*

Consider first the case of the Foundation. It claims to have been injured because the FBI's maintenance of records on the Foundation inhibited its pursuit of activities protected by the first amendment. More specifically, the Foundation claims that the FBI's maintenance of records regarding the Foundation (1) may deter potential grantees from seeking money from the Foundation and (2) may make it more difficult for current Foundation employees to find jobs elsewhere in the future.

The Foundation attempts to substantiate its claims of injury by submitting the affidavits of Valerie S. Lies, President of

the Donors Forum of Chicago, and Anne C. Hallett, Executive Director of the Wieboldt Foundation. The affiants declare, among other things, that "in the close-knit philanthropic community, an FBI file potentially limits the future employability of foundation personnel" and that "it is likely that some grantees' behavior will be affected by the maintenance of FBI files on foundations."

These affidavits speak broadly of stigma and harm to the Foundation's reputation. A "potential" limitation upon employees' future "employability" lacks concreteness. The Foundation points to not a single Foundation employee whose job prospects have been dimmed because of the FBI records. Nor does either affidavit indicate even generally how "some grantees' behavior will be affected" by the FBI records on the Foundation. The Foundation does not point to a single grantee or even type of grantee that would be any less likely to seek money from the Foundation because the FBI maintains records on it. This is not enough to establish an injury to the Foundation.

The Foundation's claim of injury also lacks immediacy. Because the Foundation does not allege that it has yet suffered any injury in the form of diminished job prospects for its employees or decreased interest from potential grantees, its only hope for standing rests upon showing that a threatened harm is "*certainly* impending." *Lujan*, 504 U.S. at 565 n.2 (emphasis in original). It is not enough for the Foundation to assert that it might suffer an injury in the future, or even that it is likely to suffer an injury at some unknown future time. Such "someday" injuries are insufficient. *Cf. id.* at 564.

The injury that a present Foundation employee might suffer when he is rebuffed by a prospective employer because the FBI maintains a file on the Foundation is speculative at best. The standing doctrine requires a greater degree of certainty that the party seeking relief from the court has a real interest at stake. *Compare Suncom Mobile & Data, Inc. v. FCC*, 87 F.3d 1386, 1388 (D.C. Cir. 1996) (company that demonstrated only intent to purchase unidentified licenses sometime in future lacks standing to challenge FCC order applying to licensees) *with Commit-*

tee for Effective Cellular Rules v. FCC, 53 F.3d 1309, 1315-16 (D.C. Cir. 1995) (individuals who would file applications for licenses if agency changed regulation have standing to challenge regulation).

The speculative nature of the Foundation's claim of injury is all the more apparent when one considers the claim *ex ante*. The purported injury depends upon the FBI's maintenance of a file on the Foundation being known to third parties. Yet the Foundation has not indicated how a reference to its name in the files of the FBI could become public knowledge unless the Foundation chose to make that information public—as the Foundation did here. Whatever injury the Foundation may suffer in the future appears to have been self-inflicted.[1]

2. *Lindblom's Standing*

Lindblom also raises a first amendment claim, but he offers no separate arguments or affidavits in support of his standing. Although Lindblom was the president of the Foundation when this litigation began, he left that position in 1994. (He is now a program officer in governance and public policy at the Ford Foundation.) Lindblom does not claim that the FBI's interest in him has limited or may limit his prospects for employment. Because Lindblom offers no separate argument or factual basis for his standing, we view his claim as derivative of the

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[1] We leave for another day the question whether, as Judge Tatel suggests, an organization concerned about the effect that information in its FBI file might have upon its first amendment activities would have standing to contest the maintenance of that information simply by alleging that "grant-seekers regularly submit FOIA requests for FBI files for grant-making institutions before applying to them." Opinion concurring in part and dissenting in part at 3-4 [App. 18a]. As this case illustrates, such a request would not likely be revealing because of the law enforcement exemptions to the FOIA. Perhaps if a foundation were to show that grant-seekers who make FOIA requests to the FBI thereafter refrain from seeking grants from that foundation—an ascertainable proposition because the foundation could itself use the FOIA to find out who has asked for its file—one might infer that the foundation is harmed by the disclosure of information in the agency's files.

Foundation's claim; i.e., any harm to him is caused by harm to the Foundation of which he was president. Accordingly, because the Foundation lacks standing and Lindblom has failed to show that he has suffered any injury in his individual capacity, we hold that Lindblom lacks standing to press a constitutional claim against the FBI.

III. Conclusion

Section (e)(7) of the Privacy Act does not by its terms require an agency to show that the information in its files relating to the first amendment activities of an individual is pertinent to a "currently" authorized law enforcement activity, and we find nothing in the structure or purpose of the Act that would suggest such a reading. Nor has either appellant alleged a sufficiently concrete and imminent injury to meet the constitutional requirements for standing to raise a first amendment claim. Accordingly, the judgment of the district court is

Affirmed.

TATEL, *Circuit Judge*, concurring in part and dissenting in part: The court's observation that the word "pertinent" modifies only the noun "record" and its assumption that "law enforcement activity" includes activities ended long ago, leads it to conclude that the FBI may, consistent with section (e)(7), inventory information on the First Amendment activities of citizens for which the agency has no present, articulable use. Because I believe the court's parsing of section (e)(7)'s language does not result in the best interpretation of that provision as a whole, I respectfully dissent from part II.A of the opinion.

The statute defines "maintain" as including both "maintain" and "collect." 5 U.S.C. § 552a(a)(3) (1994). To collect means "to gather together." To maintain means "to keep in existence or continuance; preserve." *Random House Unabridged Dictionary* 403, 1160 (2d ed. 1993). In order to give each of these verbs their meaning, I would interpret section (e)(7), as a whole, to require that records be pertinent to "an authorized law enforcement activity"—words undefined in the statute—not only at the time of gathering, i.e., collecting, but also at the time of keeping, i.e., maintaining. In other words, if there is no *current* law enforcement activity to which a record has pertinence, the agency may not maintain it. Not only does this approach avoid effectively reading the word "maintain" out of that term's statutory definition, but it furthers the Act's purpose to protect citizens from the unnecessary collection *and* retention of personal information by the government.

Congress could have written section (e)(7) in either of two ways that would clearly give it the meaning my colleagues ascribe to it—that information pertinent to an authorized law enforcement activity when collected does not lose that pertinence over time. If the statute said that an agency shall "*collect* no record describing how any individual exercises rights guaranteed by the First Amendment ... unless pertinent to and within the scope of an authorized law enforcement activity," I would agree that material need not be of continued pertinence for an agency to maintain it. Congress could have achieved the same result by requiring agencies to maintain no such record unless

"*compiled for*, and within the scope of, an authorized law enforcement activity." But the statute does not read this way, and Congress knows how to use the words "collect" and "compiled for" without also meaning "maintain." *See* 5 U.S.C. §§ 552a(e)(2) (concerning collection of information), (j)(2)(A) ("information compiled for the purpose of identifying individual criminal offenders"), (k)(2) ("investigatory material compiled for law enforcement purposes"), (k)(5) ("investigatory material compiled solely for the purpose of" determining eligibility for military and federal civilian employment, federal contracts, or access to classified information). Because Congress chose to use the word "maintain" in section (e)(7), and to define that term as both "maintain" and "collect," we know that Congress must have meant something more than just "collect." *See Bailey v. United States*, 116 S. Ct. 501, 507 (1995) (assuming that Congress uses multiple terms "because it intend[s] each term to have a particular, nonsuperfluous meaning").

Although Congress was clearly concerned about illegitimate collection of information regarding First Amendment activities, nothing in the legislative history indicates that Congress was not equally concerned, as the language of section (e)(7) indicates, with the maintenance of documents no longer pertinent to law enforcement activities. Indeed, the legislative history of the Privacy Act reveals congressional concern with *both* collection and retention of material. In describing the Act's purposes, the Senate Report recognizes collecting and maintaining files as separate activities, both deserving of careful scrutiny: "[The Act] is designed ... for long-overdue evaluation of the needs of the Federal Government to acquire and retain personal information on Americans, by requiring stricter review within agencies of criteria for collection and retention." S. REP. NO. 93-1183, at 2 (1974). Other sections of the Act carry out this purpose by requiring that records continue to be "accurate, relevant, timely and complete," 5 U.S.C. § 552a(d)(2)(B)(i); *id.* § (e)(5) (requiring agency to maintain records with "such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness"). In debating the law-enforcement amendment to sec-

tion (e)(7), House members discussed only the "maintenance" of records; they did not even refer to collection. 120 Cong. Rec. 36,957 (1974).

In support of its interpretation of section (e)(7), the court cites a passage from the Conference Report which, other than ambiguously stating that the "Compromise ... directs the prohibition against the maintenance of records," merely reproduces the language of section (e)(7). Maj. Op. at 7-8. I am equally unpersuaded by the court's suggestion that because the Privacy Act limits the use of Lindblom's files, its interpretation of section (e)(7) presents no threat to personal privacy. Maj. Op. at 9. That Congress imposed limitations on dissemination of the information is not at all inconsistent with section (e)(7)'s command: the FBI may not "maintain [records] describing how any individual exercises rights guaranteed by the First Amendment ... unless pertinent to and within the scope of an authorized law enforcement activity." Congress passed the Privacy Act to give individuals some defenses against governmental tendencies towards secrecy and "Big Brother" surveillance. *See* S. REP. No. 93-1183, at 1 (Privacy Act "is designed to prevent the kind of illegal, unwise, overbroad, investigation and record surveillance of law-abiding citizens produced in recent years from actions of some over-zealous investigators, and the curiosity of some government administrators, or the wrongful disclosure and use, in some cases, of personal files held by Federal agencies."). The fewer unnecessary files describing First Amendment activities the government keeps on law-abiding citizens, the lesser the chance of any future abuse of those files.

Turning to the MacArthur Foundation's First Amendment claim, I agree that the Foundation lacks standing, but for a narrower reason than the one set forth in section II.B.1 of the court's opinion. In my view, the Foundation lacks standing not because its claim of injury is too speculative, but because the Foundation has failed to establish the link by which the Bureau's actions would cause the alleged injury.

As the court notes, although asserting that potential grant-seekers might be reluctant to apply to the Foundation if they knew

of the FBI records, the Foundation's affidavits suggest no mechanism by which such knowledge would be available. In fact, the mechanism is not very difficult to imagine: the existence of the Foundation's file should be readily ascertainable upon a proper FOIA request. Yet the affidavits do not state that grant-seekers regularly submit FOIA requests for FBI files of grant-making institutions before applying to them. Had they done so, I believe the injury alleged here would not be unduly speculative. Otherwise, the Foundation would be unable to challenge the Bureau's retention of its files, because grant-seekers who would ferret out information on FBI files and therefore not apply to the MacArthur Foundation are hardly likely to come forward and state the reason they did not apply.

The MacArthur Foundation's alleged injuries are quite similar to the injuries the Supreme Court found adequate for standing in *Meese v. Keene*, 481 U.S. 465 (1987). There, the Justice Department required the National Film Board of Canada to include a statement at the beginning of certain films indicating that they were political propaganda. 481 U.S. at 467-68. A member of a state legislature wishing to exhibit the films claimed that the required labeling would injure his reputation and his chances of reelection. *Id.* at 473. In support of these assertions he submitted several affidavits, including one describing the results of an opinion poll and another presenting the opinion of an "experienced political analyst" that the designation of material as political propaganda "stigmatizes those conveying it." *Id.* at 473-74 & n.8. Like the affidavits in this case, they were uncontradicted. *Id.* at 474. Although the alleged injuries were clearly speculative and not necessarily fully provable even after the election, the Court held that they nevertheless sufficed to establish standing because they were "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* at 476 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Had the MacArthur Foundation alleged that grant-seekers customarily check the existence of FBI files, the same would be true here. The injury—grant-seekers choosing not to apply to the Foundation because of its FBI file—would be no more

speculative than the injury alleged by Keene—that he would lose votes because he sponsored screenings of movies labeled political propaganda.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J. RODERICK MACARTHUR FOUNDATION, et al.,

Plaintiffs,

v.

Civil Action No. 90-2906 (TPJ)

FEDERAL BUREAU OF INVESTIGATION

Defendant.

ORDER

Upon consideration of the motion of the defendant Federal Bureau of Investigation for summary judgement, the opposition of plaintiffs and amici curiae, and the Court's in camera review of the subject documents on September 1, 1995, it appearing to the Court that the FOIA exemptions claimed were properly invoked; that the documents were compiled for legitimate law enforcement purposes; and that the investigation(s) referred to therein were not of the plaintiffs, but of others with whom plaintiffs came into incidental (and, to appearances, innocent) contact, it is, this 6th day of September, 1995, for essentially the reasons advanced by defendant,

ORDERED, that defendandt's motion for summary judgement is granted, and the complaint is dismissed with prejudice.

//s//
Thomas Penfield Jackson
U.S. District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5386 **September Term, 1996**
90cv02906

J. Roderick MacArthur Foundation and Lance E. Lindblom, as President of the J. Roderick MacArthur Foundation, on his own behalf and on behalf of the Foundation,

Appellants

v.

Federal Bureau of Investigation,

Appellee

BEFORE: Ginsburg, Randolph and Tatel, Circuit Judges

ORDER

Upon consideration of Appellants' petition for rehearing filed February 7, 1997, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: //s//
Robert A. Bonner
Deputy Clerk

Circuit Judge Tatel would grant the petition to the extent it is concerned with the issue arising under 5 U.S.C. 552a(e)(7).

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5386 **September Term, 1996**
90cv02906

J. Roderick MacArthur Foundation and Lance E. Lindblom, as President of the J. Roderick MacArthur Foundation, on his own behalf and on behalf of the Foundation,

Appellants

v.

Federal Bureau of Investigation,

Appellee

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Appellants' Suggestion For Rehearing In Banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: //s//
Robert A. Bonner
Deputy Clerk

Circuit Judge Garland did not participate in this matter.

Circuit Judges Wald and Tatel would grant the suggestion to the extent it is concerned with the issue arising under 5 U.S.C. 552a(e)(7).

Supreme Court, U.S.
FILED
SEP 12 1997
CLERK

No. 97-82

In the Supreme Court of the United States

OCTOBER TERM, 1996

LANCE E. LINDBLOM, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether maintenance by the Federal Bureau of Investigation of information relating to petitioner, collected pursuant to an authorized law enforcement activity, violates subsection (e)(7) of the Privacy Act of 1974, 5 U.S.C. 552a(e)(7).

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 97-82

LANCE E. LINDBLOM, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 102 F.3d 600. The order of the district court (Pet. App. 20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1996. A petition for rehearing was denied on April 11, 1997. Pet. App. 21a-22a. The petition for a writ of certiorari was filed on July 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Privacy Act of 1974, 5 U.S.C. 552a, regulates the collection, maintenance, use, and dissemination of personal information by federal government agencies. The Act provides, *inter alia*, that individuals may seek access to and amendment of records pertaining to them. At issue in this case is subsection (e)(7) of the Act, which states that an agency shall "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. 552a(e)(7).[1]

2. Petitioner Lance Lindblom, then president of the J. Roderick MacArthur Foundation, filed Freedom of Information Act (FOIA) and Privacy Act requests with the Federal Bureau of Investigation (FBI or Bureau) headquarters and its New York, Chicago, and Washington, D.C., field offices for information maintained about him. C.A. App. 21-26, 40-41. The FBI located 23 documents responsive to petitioner's request. C.A. App. 111, ¶ 19. Those documents included a total of 36 pages, of which 13 were duplicates. *Ibid.*; see Pet. App. 2a. The Bureau "released redacted copies of several of the documents relating to [petitioner] and the Foundation but refused to release

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[1] Subsection (a)(3) of the Act states that "the term 'maintain' includes maintain, collect, use, or disseminate." 5 U.S.C. 552a(a)(3).

others, invoking exemptions 1, 2, 7(C), and 7(D) to the FOIA." *Id.* at 3a.[2]

3. Following exhaustion of his administrative appeals, petitioner filed this action in federal district court, invoking both the Privacy Act and the FOIA. Petitioner sought release of the information in his files, a declaratory judgment that the FBI's maintenance of files concerning his First Amendment activities is unlawful, an order expunging the files, an injunction against maintaining such files in the future, and damages. C.A. App. 10. The FBI filed a motion to dismiss or in the alternative for summary judgment, supported by the declarations of Special Agents (SAs) Earl Pitts and Angus Llewellyn. Those declarations described, *inter alia*, the FBI's filing system, the nature of the responsive documents, and the nature of the investigation(s) that generated the documents. See C.A. App. 59-76, 96-126.

SA Pitts stated that the investigative activity that had produced the responsive records at issue here was conducted pursuant to the FBI's responsibilities under Section 1.14 of Executive Order No. 12,333, see 46 Fed. Reg. 59,941 (1981), which provides presidential guidance concerning United States intelligence activities. C.A. App. 72, ¶ 24. He stated as well that the pertinent investigation(s) had been conducted in

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[2] The FOIA exemptions invoked by the Bureau in this case protect classified information, 5 U.S.C. 552(b)(1); the agency's internal personnel rules and practices, 5 U.S.C. 552(b)(2); and information compiled for law enforcement purposes that could, if disclosed, reasonably be expected to constitute an unwarranted invasion of privacy, 5 U.S.C. 552(b)(7)(C), or disclose the identity of a confidential source, 5 U.S.C. 552(b)(7)(D). The petition for a writ of certiorari does not present any issue involving the construction or implementation of the FOIA.

accordance with the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations. C.A. App. 72-73, ¶ 26. SA Pitts further explained that identification of a person or organization as the "subject" of an FBI file does not necessarily imply that the subject has done anything unlawful. Rather, the "subject" can include "victims, property or other targets of an unlawful or covert scheme, or a body of information in which the FBI has a law enforcement or counterintelligence interest." C.A. App. 69-70, ¶ 21.

4. On September 1, 1995, the district court conducted an *ex parte in camera* examination of the withheld documents. C.A. App. 248. On September 6, 1995, the court entered its final order granting the FBI's motion for summary judgment and dismissing the action. Pet. App. 20a. The court concluded that "the FOIA exemptions claimed were properly invoked; that the documents were compiled for legitimate law enforcement purposes; and that the investigation(s) referred to therein were not *of* [petitioner], but of others with whom [petitioner] came into incidental (and, to appearances, innocent) contact." *Ibid.*

5. The court of appeals affirmed. Pet. App. 1a-19a.

a. The court first analyzed the text of subsection (e)(7) and rejected petitioner's argument that retention of information collected in the course of legitimate law enforcement activities must be justified as pertinent to a current or active investigation. Pet. App. 6a. Under the terms of the Privacy Act, the court observed, an agency record may be retained so long as it is "[1] pertinent to and [2] within the scope of an authorized law enforcement activity." *Ibid.* (quoting 5 U.S.C. 552a(e)(7)). The court stated that

"'an authorized law enforcement activity' such as foreign counter-intelligence, is a concept far broader than either an active investigation or a 'current law enforcement necessity.'" *Ibid.* The court also pointed out that "[i]nformation that was pertinent to an authorized law enforcement activity when collected does not later lose its pertinence to that activity simply because the information is not of current interest (let alone 'necessity') to the agency." *Id.* at 7a.

b. The court also analyzed the practical consequences that would flow from acceptance of petitioner's interpretation of subsection (e)(7). It concluded that petitioner's proposed approach "would place new and daunting burdens, both substantive and administrative, upon the FBI and other government agencies, with little or no gain to individual privacy." Pet. App. 8a. The court noted that "intelligence gathering is akin to the construction of a mosaic," in that "the full import of a single piece" of evidence may become clear only when that evidence is considered in combination with other information. *Ibid.* (internal quotation marks omitted). Because "information that was once collected as part of a now-closed investigation may yet play a role in a new or reopened investigation," a requirement that records of closed investigations must be purged could hamper subsequent investigative efforts. *Id.* at 9a.

The court observed as well that responding to requests to purge files under petitioner's theory "could be difficult and time-consuming," particularly because "[t]he agency would have to inquire of all its local offices and the offices of all other investigatory agencies whether there is a current law enforcement necessity for a particular record." Pet. App. 9a.

Those burdens, the court stated, would not contribute substantially to individual privacy, since the FBI is prohibited in any event from disclosing to the public information contained in its files. *Ibid.* The court concluded that "Section (e)(7) of the Privacy Act does not by its terms require an agency to show that the information in its files relating to the first amendment activities of an individual is pertinent to a 'currently' authorized law enforcement activity, and we find nothing in the structure or purpose of the Act that would suggest such a reading." *Id.* at 14a.[3]

Judge Tatel dissented with respect to the Privacy Act ruling. See Pet. App. 15a-19a. Consistent with petitioner's proposed construction of subsection (e)(7), Judge Tatel concluded that "if there is no *current* law enforcement activity to which a record has pertinence, the agency may not maintain it." *Id.* at 15a.[4]

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[3] The court also held that the district court had not abused its discretion in denying discovery, since the documents petitioner sought were largely classified and the district court's *in camera* examination of the withheld information informed its decision that discovery was not necessary to its ruling on the FBI's motion for summary judgment. Pet. App. 10a-11a. In addition, the court held that neither petitioner nor the MacArthur Foundation had standing to raise a First Amendment claim because neither had shown injury resulting from the FBI's maintenance of information about them. *Id.* at 11a-14a. Petitioner does not challenge those rulings here.

[4] Shortly before the court of appeals issued its ruling, it was disclosed that SA Pitts, who had submitted a declaration in support of the government's summary judgment motion, had been arrested for espionage. (Pitts later pleaded guilty to that charge.) The government brought Pitts's arrest to the court's attention on December 23, 1996. The court issued its decision the next day; its opinion contained no reference to the Pitts

ARGUMENT

Petitioner contends that the information in his file, while properly collected in the first instance, may not be retained by the FBI unless it is pertinent to a "current law enforcement activity," Pet. 12, by which he appears to mean an active or ongoing investigation. That claim lacks merit. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals' decision is consistent with the language of the Privacy Act. Subsection (e)(7) requires only that agency records describing expressive and associational activities protected by the First Amendment must be pertinent to and within the scope of an "authorized law enforcement activity."

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declaration or to any other declaration in the record. In response to petitioner's petition for rehearing with suggestion of rehearing in banc, the government noted, *inter alia*, that other record evidence (including copies of the redacted documents) supported the government's position and that both the district court and the court of appeals had examined the documents *in camera*.

Petitioner also sought relief in the district court pursuant to Rule 60(b), Fed. R. Civ. P. In opposing that motion, the government submitted additional declarations of other FBI agents who had independently reviewed the records at issue here. Those declarants reaffirmed SA Pitts's descriptions of the general manner in which counterintelligence activities are carried out, and they confirmed that the records in question had been collected pursuant to an authorized counterintelligence activity. The court of appeals denied rehearing and rehearing in banc on April 11, 1997. Four days later, petitioner withdrew his Rule 60(b) motion. The petition for a writ of certiorari does not raise any issue related to SA Pitts's arrest and conviction.

5 U.S.C. 552a(e)(7). As the court of appeals recognized, that concept is far broader than "current law enforcement necessity" or active law enforcement investigation. See Pet. App. 6a. Petitioner does not deny that the investigative activities that generated the records at issue here were "authorized" at the time they were conducted. It is clear, moreover, that the records remain "pertinent to and within the scope of" the investigation(s) that produced them. See *id.* at 6a; see also *id.* at 7a ("Information that was pertinent to an authorized law enforcement activity when collected does not later lose its pertinence to that activity simply because the information is not of current interest (let alone 'necessity') to the agency."). The court of appeals was therefore correct in holding that the Bureau had satisfied the statutory requirements for maintenance of the information in petitioner's file.[5]

Contrary to the contentions of petitioner and the dissenting judge (see Pet. 13; Pet. App. 15a), the court of appeals' interpretation of subsection (e)(7) does not render the word "maintain" superfluous. Where records describing First Amendment activity are not

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[5] The Federal Records Act of 1950, 44 U.S.C. 3101 *et seq.*, requires federal agencies to create and maintain records that adequately and properly document the agency's organization, functions, policies, decisions, procedures, and transactions. See *American Friends Serv. Comm.* v. *Webster*, 720 F.2d 29 (D.C. Cir. 1983). Thus, retention of records pertinent to authorized law enforcement activities serves to document the agency's performance of its official functions as well as to facilitate future investigative endeavors. To require the FBI to expunge or destroy a lawfully-created record of its legitimate, authorized law enforcement activities would be at odds with basic federal recordkeeping principles.

collected pursuant to any authorized law enforcement activity, subsection (e)(7) makes clear that an agency's retention of those records is a continuing Privacy Act violation. Inclusion in the Act of the word "maintain" does not, however, affect the inquiry into whether particular records are "pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. 552a(e)(7).[6]

2. As the court of appeals explained, acceptance of petitioner's position "would place new and daunting burdens, both substantive and administrative, upon the FBI and other government agencies." Pet. App. 8a. The substantive burdens would be particularly acute in areas, such as counterintelligence, that require federal law enforcement agencies to take both a broad and temporally long view in examining isolated events in relation to other events. This Court has explained that "the very nature of the intelligence

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[6] It is not clear, moreover, that petitioner would prevail in this case even if subsection (e)(7) were construed to require pertinence to a "current" law enforcement activity. As the district court noted, the investigation(s) that produced the documents at issue here "were not *of* [petitioner], but of others with whom [petitioner] came into incidental (and, to appearances, innocent) contact." Pet. App. 20a. Thus, even if petitioner's proposed construction of subsection (e)(7) were accepted, the Bureau would not be required to demonstrate that it is currently investigating petitioner himself. Rather, it would suffice to show that the FBI is currently conducting *some* investigative activity as to which the existing file might be relevant. The record in this case indicates that while some of the "targets and subjects of the intelligence activities and methods detailed in the information at issue may not be of present interest to the FBI, certain individuals and organizations are currently of investigative interest to the FBI." C.A. App. 66, ¶ 13.

apparatus of any country is to try to find out the concerns of others; bits and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself." *CIA* v. *Sims*, 471 U.S. 159, 178 (1985) (internal quotation marks omitted). Accord, *e.g.*, *In re United States*, 872 F.2d 472, 475 (D.C. Cir.) ("[T]he business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate."), cert. dismissed, 493 U.S. 960 (1989).

Petitioner argues (see Pet. 10-11, 18) that the "mosaic" theory cannot be used to justify retention of information for which no presently articulable need exists. As the court of appeals recognized, however, the Bureau's ability to carry out its functions would be impaired if it were required to purge investigative records for which no current necessity could be demonstrated. Because the significance of particular information often cannot be appreciated until it is viewed in combination with other data, "information that was once collected as part of a now-closed investigation may yet play a role in a new or reopened investigation. If the earlier record had been purged, however, then the agency's later investigation could not be informed by the earlier event(s)." Pet. App. 9a.[7]

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[7] In the court of appeals, petitioner "particularly object[ed] to the FBI's maintenance of the relevant records in a file retrievable by his name." Pet. App. 10a. A rule that would prevent cross-indexing, however, would be unworkable and

The administrative burdens imposed by petitioner's approach would also be severe. Law enforcement agencies necessarily compile voluminous investigative records that are created in full compliance with the requirements of subsection (e)(7). To require the agencies continually to review those records, and to purge records not pertinent to "current" investigative activities, would impose enormous and unworkable burdens. To determine whether a "current law enforcement necessity" existed to justify retention of information, the Bureau would be required to consult with all of its field offices and with other law enforcement and investigative agencies. The court of appeals correctly declined to attribute to Congress an intent to "require[] so formidable an undertaking." Pet. App. 9a.[8]

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would frustrate efficient law enforcement. See C.A. App. 70, ¶ 21 (declaration of SA Pitts states that the "concept of the subject of an investigation is necessary to coordinate nationwide enforcement efforts and to quickly locate records using only small bits of information").

[8] A requirement that agency files be purged if no current necessity exists could also result in new (and duplicative) investigations when the need for the information becomes apparent. To require law enforcement agencies to re-conduct prior investigations would waste scarce agency resources and impose unnecessary burdens on persons who are the subjects of the investigation.

As the court of appeals observed, moreover, acceptance of petitioner's interpretation of subsection (e)(7) would not "contribute appreciably to individual privacy," since the Privacy Act generally prohibits the public disclosure of information contained in agency files. Pet. App. 9a; see 5 U.S.C. 552a(b). Exceptions to that general bar exist for, *inter alia*, records the disclosure of which is required by the FOIA. See 5 U.S.C. 552a(b)(2). The FOIA itself, however, exempts "records or

3. Petitioner contends (Pet. 19-21) that the court of appeals' ruling in this case conflicts with the decision of the Seventh Circuit in *Becker* v. *IRS*, 34 F.3d 398, 407-409 (1994). In *Becker*, the Internal Revenue Service maintained files on the plaintiffs that included "a flyer advertising a book and a collection of newspaper articles regarding various IRS actions against certain individuals and groups who are alleged tax protesters or cheats." *Id.* at 408. The documents contained no reference to the plaintiffs. *Ibid.* The court of appeals accepted the district court's conclusion that inclusion of those materials in plaintiffs' files could be said to describe the plaintiffs' exercise of First Amendment rights. *Ibid.* The court "conclude[d] that the IRS ha[d] not carried its burden in establishing that the materials are exempt from Privacy Act requirements," and it ordered that "the documents should be expunged." *Id.* at 409.

No circuit conflict exists, since the factual setting addressed by the *Becker* court is markedly different from that at issue here. Although the *Becker* court noted in passing that the documents in question were "contained in files which were closed in April 1991," 34 F.3d at 408, its principal concern was the absence of any apparent connection between the plaintiffs and the events described in the articles, see *id.* at 409. Indeed, the Seventh Circuit did not squarely address the question whether the files in question had *ever*

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information compiled for law enforcement purposes * * * to the extent that the production of such law enforcement records or information * * * could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). In the present case, petitioner has identified no instance in which the Bureau released to the public information in his file.

been pertinent to an authorized law enforcement activity.[9] *Becker*, moreover, did not involve counterintelligence operations. Because successful counterintelligence often requires the agency to correlate seemingly unrelated (and seemingly innocuous) events occurring over a broad span of time, the need to preserve information for which no current necessity exists is particularly acute. In contrast to *Becker*, the material at issue here relates directly both to petitioner and to the underlying counterintelligence investigation.

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[9] Indeed, the *Becker* court's discussion of possible future uses of the material in an authorized law enforcement activity (see 34 F.3d at 408) may well reflect only that, in the circumstances of that case, such future use was the only conceivable justification for maintenance of the records, since there was no apparent nexus to any past or ongoing law enforcement activity concerning the plaintiffs. See also *ibid.* ("to the extent that the IRS has engaged in the practice of collecting protected information, unconnected to *any* investigation of *past, present or anticipated violations* of the statutes which it is authorized to enforce, subsection (e)(7) of the [Privacy] Act has been violated") (quoting *Clarkson* v. *IRS*, 678 F.2d 1368, 1375 (11th Cir. 1982), cert. denied, 481 U.S. 1031 (1987)) (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-82

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LANCE E. LINDBLOM,

Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

In opposing review respondent attempts to support the decision below by ignoring traditional rules of statutory construction and proposing a strained reading of § (e)(7) of the Privacy Act ("Act") which is unrealistic and contrary to Congress' intent. Respondent then argues against a proper construction of the Act by recasting the legitimate requirements of § (e)(7) into imaginary and unwarranted burdens. Finally, the FBI misconstrues both the facts and the reasoning of the Seventh Circuit's opposing precedent, *Becker v. I.R.S.*, 34 F.3d 398 (7th Cir. 1994).

1. As a preliminary matter, the government has misrepresented petitioner's position as allowing the maintenance of First Amendment information only if there is "an active or ongoing investigation." Brief for the Respondent In Opposition, 7 ("Opp. Cert. __"). That is not the case. What the Privacy Act does demand, as stated by Circuit Judge Tatel, is a "present, articulable use" for keeping this sensitive and constitutionally chilling information. Pet. App. 15a. It is precisely this showing that the FBI is unwilling and apparently unable to make.

According to the FBI, the requirements of § (e)(7) are satisfied as long as it can show that information describing an individual's First Amendment activities was pertinent when collected, no matter how long ago collected or how irrelevant to present concerns of national security. Though petitioner acknowledges that § (e) (7)'s concept of authorized law enforcement activity may not be limited to an active or ongoing investigation, he vigorously asserts that § (e)(7) requires an agency to show that keeping First Amendment-related information matters to the agency, and the country, *now*.

2. Respondent refuses to address any of the applicable rules of statutory construction. Nor does it address Congress' explicit language in the preamble of the Act which prohibits federal agencies from collecting or keeping information "in a man-

ner" that is contrary to the Act. This language makes clear that Congress was concerned with *how* agencies keep First Amendment information, as well as *how* they collect it. Pet. App. 16-17. This explicit proscription in the preamble is directly at odds with the appeals court's conclusion that § (e)(7) requires only that information be pertinent and not that *keeping* such information be pertinent.

Respondent argues only that the decision of the court of appeals did not render the definition of "maintain" superfluous, because § (e)(7) "makes clear that an agency's retention of those records is a continuing Privacy Act violation." Opp. Cert. 8-9. But, this is an unrealistic and implausible purpose for the language at issue. It requires Congress to have felt the need to inform federal agencies like the FBI that they must not keep information they unlawfully collected. To say the least, such a construction imputes a sorry lack of common sense to federal agencies. And to the extent that it does *not* impute such ignorance, the government's reading is entirely impractical in instructing agencies to do what they already must do. *See, e.g., Peters v. Hobby*, 349 U.S. 331, 348-49 (1955)(ordering expungement of Loyalty Review Board findings from federal employee's personnel records on showing that Board acted without jurisdiction).[1]

3. The government erroneously asserts that petitioner's approach would result in "severe" administrative burdens on law enforcement agencies by requiring agencies "continually to review" records for pertinence, and, as part of any such review, "to consult with all of [their] field offices and with other law enforcement and investigative agencies." Opp. Cert. 11.

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[1] Neither does the government's reliance on the Federal Records Act of 1950, 44 U.S.C. § 3101 *et seq.* (Opp. Cert. 8 n.5), provide support for its interpretation of § (e)(7). The Federal Records Act requires only that records be destroyed in compliance with regulations promulgated by the Archivist. *See* 44 U.S.C. § 3302. Nothing in the Federal Records Act requires the indefinite retention of information on Americans' First Amendment activities.

But petitioner does not seek "continual review" by federal agencies. To the contrary, there are a number of administratively convenient occasions when agencies can easily comply with their § (e)(7) duties. At the time of closing an investigation, for example, it would not be unduly burdensome to determine the need to keep information relating to First Amendment activities. Similarly, reviewing for pertinence when processing a Privacy Act request would be no undue burden. Under any such request, an agency is required by the Act to notify its local offices—at least to find out if files on the requester are held in any of them. In addition, the agency already must inspect any files on the requester in great detail in order to determine what materials it will release. Indeed, government submissions to the district court in this very case show that at least two agents reviewed petitioner's files in their entirety. [J.A. 59, 96] The government's assertion that the burden involved in doing a similar evaluation as to the pertinency of First Amendment information at the time of the request is consequently insupportable.

4. The government continues to rely on its "mosaic" theory. It argues that, due to the special needs present in intelligence operations, agencies like the FBI must be able to retain information even when they cannot show the current pertinence of the information. Opp. Cert. 10. This effectively means that the FBI must be permitted to forever retain *every single* intelligence file it compiles, even ones describing First Amendment activities, no matter how innocent the information, because the FBI can never be sure that the information will not prove valuable in the future.[2]

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[2] The government cites *C.I.A. v. Sims*, 471 U.S. 159 (1985) in support of this position. Opp. Cert. 10. But the case is of no relevance here. *Sims* is a FOIA case concerning whether to make publicly available, information concerning intelligence sources—information that the CIA was concerned might fall into the hands of foreign agents. There is nothing in the Court's opinion that provides meaningful support for the FBI's apparent practice of retaining any information it pleases—including information describing the First Amendment activities of U.S. citizens—regardless of how irrelevant to any present interests.

The FBI's own conduct, however, belies this assertion. For example, at issue in *Patterson by Patterson v. F.B.I.*, 893 F.2d 595 (3d Cir. 1990), was a name-retrievable file describing certain of appellant's First Amendment activities. The court indicated that the FBI had offered, as late as at oral argument, to expunge appellant's name from its records. *Id.* at 598 & n.5. Apparently, the FBI was quite able to make a determination that there was no need, *in the case of a particular person*, to continue to maintain a name-retrievable file.

Obviously, making such a determination did not impose a daunting substantive burden on the FBI. It is very hard indeed to see how making such an individualized determination regarding petitioner's records would be any harder. This is all petitioner would have the agency do as a condition of retaining information about his lawful and protected associational activities.

5. The government asserts that the decision in *MacArthur* does not conflict with *Becker v. I.R.S.*, 34 F.3d 398, 407-09 (7th Cir. 1994), because "the factual setting addressed [in *Becker*] is markedly different from that at issue here." Opp. Cert. 12. This is incorrect.

In the first place, the government attempts to distinguish *Becker* on the ground that the *Becker* court never "squarely address[ed] the question whether the files in question had *ever* been pertinent to an authorized law enforcement activity," (Opp. Cert. 12-13), while Lindblom has conceded the propriety of the collection of his record. But even a cursory reading of the *Becker* opinion reveals that the court resolved the point in issue on the basis that the Beckers' files were pertinent at the time of collection. As the reviewing court recounted, the district court had made such a finding. 34 F.3d at 408. And the *Becker* court's criticism of the district court was *not* with this finding, but rather with its inference that "maintenance"—*i.e.*, retention—of the files was *thereby* justified. *Id.* The court essentially reasoned that it doesn't follow from the assumed pertinence of the files at the time of collection that the retention of the files was justified.

Id. at 408-09.

In the second place, the government tries to distinguish *Becker* on the basis that the case did not involve counterintelligence operations while *MacArthur* does. Opp. Cert. 12. But if this makes a difference in the applicability of § (e)(7), then the *IRS* is obliged under § (e)(7) to independently justify the retention of properly collected records, but agencies (like the FBI) that are engaged in counterintelligence operations are not. It is clear, however, that this distinction cannot possibly be extracted from § (e)(7), a statute that is addressed quite simply to every agency that maintains a system of records.

In short, neither of the government's asserted distinctions between *MacArthur* and *Becker* does away with a clear circuit split on what § (e)(7) requires. The truth of the matter is this: the Seventh Circuit requires federal agencies to independently justify the retention of First Amendment information that they have properly collected, while the District of Columbia Circuit does not.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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